No. 45917-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re: the Estate of ANITA D. TUTTLE,

DAISY ANDERSON, et al, Appellants

vs.

PATRICIA HICKLIN, Personal Representative of the Estate, Respondent.

APPELLANT'S RESPONSE TO MRS. HICKLIN's REPLY BRIEF OF THE CASE

Barry C. Kombol, WSBA 8145
Rainier Legal Center, Inc. P.S.
31615 - 3rd Avenue
Black Diamond, WA. 98010
(360)886-2868

Attorney for Appellants

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I. APPELLANTS REPLY
to
PATRICIA HICKLIN's ARGUMENT

A. BACKGROUND: Appellants do not take issue with the contents of P.R. Hicklin's Background discussion. To clarify the record and in reply to Mrs. Hicklin's suggestion at Page 9 of her Brief that Appellants' pleadings in the Superior Court were defective under RCW 11.96A.090(2); Appellants' Petitions were **not** 'commenced as a new action'. The Petitions filed by the Appellants on September 23, 2013 and upon filing, the Clerk assessed the $240.00 filing fee (*See* note "***pd $240 fee***" **CP-038**).

The Superior Court Clerk's records show that a new filing fee was paid on September 23, 2013. The record doesn't show why a new cause number wasn't assigned to the Petitions, or what the Petitioners could have done the day they filed their Petitions other than to pay the Statutory $240.00 filing fee to the Clerk of the Clallam County Superior Court.

B. WILL CONTEST PROCEDURE. Mrs. Hicklin argues that Chapter 11.24.010 provides the exclusive procedure for contesting the admission of a Will to probate. If that were the case, then what reason

exists for the legislature having failed to abolish the next section of Chapter 11, Title 24 where the probate code clearly provides an alternative manner to contest a Will. RCW 11.24.020 clearly provides:

> "Upon the filing of the petition referred to in RCW 11.24.010, notice shall be given as provided in RCW 11.96A.100 to the executors who have taken upon themselves the execution of the will . . ."

The notice to which RCW 11.24.020 refers is also relatively clear:

RCW 11.96A.100 Procedural rules.

> Unless rules of court require or this title provides otherwise, or unless a court orders otherwise:
> (1) .....
>
> (2) A summons must be served in accordance with this chapter and, where not inconsistent with these rules, the procedural rules of court, however, if the proceeding is commenced as an action incidental to an existing judicial proceeding relating to the same . . . estate . . . . notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceedings . . . .

For some reason not explained by Respondent, those two statutes remain statutory authority which support the alternative manner the Appellants used in contesting their Mother's Will.

If they were confused about the requirement that a 'new action' be commenced, then the Superior Court Clerk was similarly confused when a new cause

number was not assigned to their Petitions when they paid the statutory filing fee when their Petitions were filed and they sought and obtained the Order to issue the Citation.

The Court Commissioner's Order of September 23rd which directed the issuance of the Citation ordering the P.R. to appear on October 4th was the 'leave of the trial court' which at page 9 of her Reply the Respondent argues is required pursuant to RCW 11.96A.090(3).

What more could Mrs. Tuttle's three daughters have done but file their Petitions, pay the statutory fee and obtain the Order for Citation (which made two specific references to RCW 11.24.020 (**CP 032** and **034** - both at Caption and Page Bottom).

Mrs. Hicklin's counsel also appears to have been confused about the proper procedure required under the conflicting statutes, because in the response submitted by Mrs. Hicklin's counsel on September 25th at Paragraph 3.1 at Page Two of his response (**CP 030**) he stated:

"Pursuant to RCW 11.24.020, notice of the hearing on a will contest is to be given as provided in RCW 11.96A.100. According to RCW 11.96A.110, any notice that is given pursuant to RCW 11.96A.100 must be given no less than twenty (20) days prior to the hearing on the matter at issue."

Based upon that Objection, the '**REQUEST FOR RELIEF**' that followed (**CP 031**) at paragraph 4.2, Hicklin's counsel requested the following relief:

> "4.2 At the initial hearing on the Petition, directing the petitioner to note this matter for a trial setting, for trial on the issues set forth in the petition and in this Response;"

Incredibly, as soon as the ninety days referred to in the prior section of Title 11, Chapter 24 had passed (and despite the Appellant's noting the matter for the Trial Setting (**CP 016-17**) a setting Mrs. Hicklin had requested in her September 25th pleading) Mrs. Hicklin moved to dismiss the Petitions on the basis of the prior section - and argues before this Court that RCW 11.24.020 did not provide statutory authority or a procedure for filing a Will Contest action and provide notice to the P.R.

If the Court Clerk was confused enough about the procedure for commencing Will Contest actions under Section .020 of Chapter 24 of the Code (by accepting the Petitions *and* collecting the statutory fee without assigning a new cause number to the matter; and if the Court Commissioner who on September 23rd was similarly not familiar enough with the Will Contest statute to deny the issuance of the Citation

that day; and if Mrs. Hicklin's counsel did not alert the Court or the Appellants that it would later be argued that the personal service requirements of RCW 11.24.010 were mandatory and that the next statutory section could not apply to a Will Contest proceeding, then how could ladies such as Doreen Hunt, Daisy Anderson and Sharon Horan known what else they could have done to bring an action to Contest the validity of their Mother's Will?

And if lay persons such as the Appellants can become confused about the contradictory scheme the legislature appears to have created, consider the following excerpt from the article in Chapter 9 of Estate Disputes, by S. Johnson and K. Hicks, Chapter 9, pp. 9-37-38, *Washington Probate Deskbook*, 2005:

> "There are significant differences between a citation and a summons. First, a citation need be served only on legatees who are Washington residents, while a summons must be issued to *all* parties, a term defined in TEDRA without limitation to in-state residents. 11.96A.030(4). Second, though TEDRA at first seems to have a more inclusive service requirement, service of a summons need only be made on parties who were not already parties to the existing estate proceeding, but a citation must issue to all in-state parties regardless of whether they already have notice of the underlying probate proceeding. RCW 11.96A.100(2). Finally, a citation must be personally served, while TEDRA permits service of the summons by mail. RCW 11.96A.110. The inconsistencies between the citation and summons requirements may create questions in the practical satisfaction of notice and service requirements."

The authors of the Probate textbook end Chapter 9 as follows:

Practice Tip:	Until the issue is clarified, it may be prudent in a will contest to issue both a citation under RCW 11.24.020 and a TEDRA summons under RCW 11.96A.100(2)

Would it be too hard to expect (or insist) that the legislature to clarify the confusion in the existing statutory schemes regulating Will Contests that has confused litigants, Court Commissioners, Trial Courts as well as probate practice commentators? The fault for a failure to comply exactly with conflicting statutory schemes should not result in the Appellant's loss of a chance to litigate the validity of their mother's disputed Will.

Despite Mrs. Hicklin's artgument that RCW 11.24.020 should not be considered as an acceptable way to commence and prosecute a Will Contest action, that statute remains - unfortunately - on the books. As long ago as in the 1917 case In re Murphy's Estate, 98 Wash. 548, 168 P. 175 (1917) our courts have recognized that a technical error (there the issuance of a Citation directed to the executor personally rather than in his official capacity) was not a fatal error despite the fact that the statute

required notice be furnished to the Estate Executor, not to that person, individually.

Likewise, In re Estate of Palucci, 61 Wash. App 412, 810 P.2d 970 (1991) it was held that a trial court erred in dismissing a petition for insufficient service when the purported error involved service, by mail, of an "Order granting a will contestant a hearing" involved the functional equivalent of a citation, because it named the executor and required an appearance by the P.R. on a specific date to answer the Will Contest Petition.

Citing the doctrine espoused in In Re Van Dyke, 54 Wash. App. at 231, 772 P.2d 1049 (1989) and Lee v. Western Processing Co. 35 Wash. App. 466, 468, 667 P.2d 638 (1983) that 'the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy", the Palucci court ruled that 'where notice by publication or mailing had, in fact been given, the failure to establish proof of service amounted to a mere irregularity, and reversed the trial court dismissal of the Will Contest action, after noting that the parties resisting the Will Contest action 'did not claim they did not have actual notice of

the . . . show cause hearing' distinguishing the opponent's reliance on Case v. Bellingham, 31 Wn.2d 374, 197 P.2d 105 (1948) because there had not been actual notice to the litigants in Case v. Bellingham, while undisputed notice (albeit by mail) had been given and received by the Executor of the Palucci Estate.

Although involving an unreported decision, this Court struggled in similar fashion as Division One did in Palucci, supra (and even cited Palucci approvingly) in the unreported 2002 In Re. Costales case. It was in that unreported decision that counsel for the Appellants here found careful discussion of In re Estate of Toth, 138 Wn.2d 650, 653, 981 P.2d 439 (1999) (quoting Van Dyke, 54 Wash. App at 228) and the above-cited In re Murphy, and In re Palucci, cases. In each of those reported cases, the Appellate Court determined it was error to have dismissed an otherwise valid Will Contest action on service or procedural technicalities.

C. **ATTORNEY FEE REQUESTS**. Chapter 9, *Washington Law of Wills and Intestate Succession*, WSBA 2nd Ed. (2006) contains a thorough discussion of awards of attorney fees and costs in Will Contest proceedings.

At page 368, Para. A.2.f.(1), the authors state:

> "In most instances, the award of costs or attorney fees in a will contest action is within the discretion of the court. Under RCW 11.24.050, relating specifically to will contests, a successful contestant may be awarded costs, but if the contest is brought in good faith and with probable cause, an unsuccessful contestant can be assessed costs but not attorney fees. In re Chapman's Estate, 133 Wash. 318, 321-22, 233 P. 657 (1925), In re Eichler's Estate, 102 Wash. 497, 173 P. 435 (1918), In re Hastings' Estate, 4 Wh. App. 649, 484 P.2d 442 (1971).
>
> In contrast to the specific language of RCW 11.24.050, however, is the much broader grant of discretion in RCW 11.96A.150, a part of TEDRA that applies to all of Title 11 RCW. The latter statute provides that either the trial or appellate court "may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party" from any party or from the estate or non-probate property, "to be paid in such a mount and in such manner as the court determines to be equitable. . . .
>
> Therefore, despite the language of the will contest statute, the court has been given very broad discretion in the award of costs and attorney fees in Will Contests. Nevertheless, the courts can be expected to continue to follow precedent as a guide to what is "equitable' absent specific directives to the contrary."

Here, of course, there has not been any determination of the merits of the Appellant's Will Contest action because it was dismissed before any substantive hearings or proceedings occurred.

The Trial Court made no finding of 'bad faith' or lack of probable cause in the Appellants' commencement of the Will Contest proceeding (nor of course, could any such finding have been made in the absence of any substantive hearings).

Therefore, the specific requirements for awards of attorney fees as contained in RCW 11.25.050 are missing. Appellant's sole failing, in the eyes of the Trial Court, was to have failed to precisely adhere to the provisions contained in Section .010 of Chapter 24 of Title 11 RCW rather than relying on the next section of Title 11.

As is argued above, that technical failure should not either (a) be the basis for the dismissal of their Petitions or (b) reason for an adverse fee and cost award.

III. CONCLUSION

The Superior Court's dismissal of the Appellants' Will Contest Petitions should be reversed and this Court should direct that the Petitions be set for Trial on the merits.

No costs or attorneys fees should be awarded at this time to any of the parties at this Court or in the Superior Court, because it has not been determined whether or not the Appellants' Petitions were commenced with merit.

RESPECTFULLY SUBMITTED on September 18, 2014.

BARRY C. KOMBOL, WSBA #8145
Attorney for **APPELLANTS**

CERTIFICATE OF MAILING

Susan Burnett, certifies under penalty of perjury of the laws of the State of Washington as follows:

1. That she is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of twenty-one years, not a party to the above-entitled action and competent to be a witness therein:

That on the 18th day of September, 2014, the Appellant's Response to Mrs. Hicklin's Reply Brief of the Case was placed in the **U.S. Mail, First Class, Postage Prepaid** to:

Court of Appeals, Div. II
Clerk of the Court [For Filing]
950 Broadway, Suite 300
Tacoma, WA. 98402-4454

Simon Barnhart [Attorney for Respondent]
Platt Irwin Law Firm
403 S. Peabody Street
Port Angeles, WA. 98362-3210

DATED: 9/18/2014, Black Diamond, WA.

Susan J. Burnett

Susan J. Burnett, Paralegal